United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1399

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P/S

to be argued by,
HERMAN H. TARNOW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

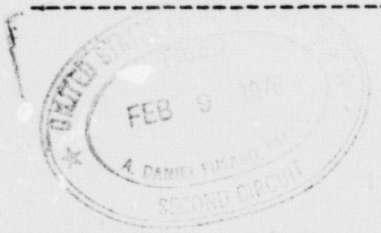
v.

WILLIAM WOOTEN,

DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- : Docket #75-1399

WILLIAM WOOTEN, :

Defendant-Appellant. :

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Whether defendant Wooten was denied Due Process of Law and the right to effective representation by the Trial Judge's hasty commencement of the trial and failure to grant defendant's request for a brief adjournment.

2. Whether it was error for the Trial Judge to preclude the defendant from presenting evidence (a) affecting the credibility of government agents, and (b) regarding the loss or destruction of contradictory statements of another witness.

3. Whether the totality of the prosecutorial misconduct was so overwhelmingly prejudicial as to deny the defendant the right to a fair trial.

4. Whether the Court's charge was so erroneous, confusing and misleading as to prohibit the Jury from rendering a fair and impartial verdict.

5. Whether the defendant William Wooten's guilt has been proven beyond a reasonable doubt.

STATEMENT OF THE CASE

This is an appeal by William Wooten, from the United States District Court for the Southern District of New York. Wooten was found guilty by a jury after trial on October 20, 1975, of Counts 1 and 3, upon an indictment filed on the 7th day of July, 1975. Said indictment charged Wooten with conspiracy to violate Sections 812, 841(a)(1), and 841(b)(1a) of Title 21, United States Code, as well as Section 2, Title 18, United States Code. Sentence was imposed on November 21, 1975. Wooten was sentenced to a period of imprisonment for two years pursuant to Section 3651, Title 18 U.S.C., with the provision that he be confined to a jail type institution for a period of six months. Execution of the remaining sentence was to be suspended and Wooten was placed on special parole for a term of three years to commence upon the expiration of confinement. Defendant was freed on bail pending appeal.

STATEMENT OF THE FACTS

The government called an indicted co-conspirator, Borchardt. Borchardt testified that he requested Wooten to lend him money since he was in heavy debt and he was threatened (Tr 197). He begged Wooten to give him the money and stressed the fact that his safety was in jeopardy (Tr 200). He never told Wooten that he planned to use the money for the sale of cocaine (Tr 201), and indeed, Wooten knew nothing of the purchase of the cocaine which took place on March 10, 1975 (Tr 201).

At best, Wooten was told that Borchardt was going to use the money to purchase marijuana (Tr 165). On March 10, 1975, in accordance with the agreement, Wooten came and requested his original $2,000.00 back. He was advised that the money had been used to purchase cocaine (Tr 167). The government contends that Wooten was concerned that his $2,000.00 was lost, and Wooten requested to hold part of the cocaine as collateral for the money he had lent Borchardt. (Tr 168). In fact, an argument took place between Borchardt

and Wooten concerning the violation of trust with respect to the original reasons for the borrowing of the money (Tr.210-Tr 211).

Borchardt convinced Wooten that he should go with him over to the area where the sale of cocaine is to take place and that he could hold the cocaine pending receipt of his $2,000.00 (Tr 168).

Borchardt had made arrangements to sell the cocaine to the undercover officer (Tr 37).

The undercover officer had previously conducted transactions with Borchardt's accomplices (Tr 32). The sale was scheduled to take place on March 10, 1975, had been set up by these men, and was consummated by these men solely with the assistance of Borchardt.

On March 10th, the police officer parked his car in the vicinity of 1687 Third Avenue, in the County of New York. (Tr 37). He was advised by a co-conspirator that "the man" was on his way and that he was going to be wearing a blue ski jacket (Tr 38).

A few minutes later a yellow checker cab pulled up in front of 1687 and, the undercover officer exited with the co-conspirator, Petrillo. (Tr 39). They proceeded to the hallway of 1687 and the officer observed a man getting out of the taxicab (Borchardt) wearing a blue ski jacket (Tr 39).

The agent then stated, "As the fellow in the blue ski jacket who was Randall Borchardt, exited the cab, I observed him handing clear plastic package with white powder to the man..to Mr. Wooten, who was wearing a long black coat." (Tr 39). The agent was approximately 10 to 15 feet from the cab and it was around Noon. (Tr 39).

All of the principals, withthe exception of Wooten, then proceeded to the apartment to complete the transaction. (Tr 40). Borchardt advised that he did not have all of the cocaine and that his "partner" who had $5,000.00 invested in the deal, was downstairs with the remaining cocaine. (Tr 41). Subsequently, Borchardt acknowledged that he lied to the officers

concerning the involvement of this individual (Tr 203).

There is a contradiction in the testimony presented by the government concerning what took place immediately after the principals entered the apartment.

One story has it that Borchardt left the apartment and joined Wooten in a bar down the street. According to Borchardt's testimony, he asked Wooten for the package in the bar. However, Wooten did not want to give it to him there and said that they should go outside. (Tr 174). Wooten then left the bar, walked north on Third Avenue, turned the corner and at that point Borchardt asked Wooten for the package. Wooten apparently refused and a discussion took place. (Tr 174). However, Borchardt eventually convinced Wooten to hand over the remaining cocaine and Borchardt returned to the apartment. (Tr 174 - 175).

The government surveillance agents however, tell a different story (it should be noted that both witnesses are government witnesses. The defense did

not offer any evidence concerning the transaction.)

There were three government agents set up to observe the premises. One agent, Moran, observed the taxicab arrive at 1687 Third Avenue and saw the undercover agent, Greenan, enter the building accompanied by a co-conspirator, Petrillo. (Tr 249-250). Although he saw Wooten paying the driver and Borchardt meet with special agent Greenan and Petrillo, he did not observe any passage of a clear plastic bag containing a white powder. (Tr 259). He did observe Borchardt leave the building and join Wooten on the street outside of a b[illegible] and proceed north on Third Avenue. He saw Borchardt re-enter the building and Wooten proceed to a grocery store. Indeed, he photographed the entire series of events on Third Avenue (Tr 215). However, at no time did he see any bag containing a white powder pass between the individuals. (Tr 259).

Another agent, Powers, testified that he too was on duty on March 10, 1975 on Third Avenue

between 95th and 96th Streets, and that he was utilizing binoculars. (Tr 271). He observed Wooten and Borchardt walking south on Third Avenue (Tr 271), and a little later he observed Wooten walking north on Third Avenue to the corner of 95th Street, enter a grocery store, and shortly thereafter leave the grocery store eating a banana.

Despite the fact that he had a clear view of the entrance of the building, the taxicab and the entire street, he did not see Borchardt pass anything to Wooten (Tr 275).

A third agent, O'Connor, was also stationed in the vicinity of 1687 Third Avenue on March 10, 1975. He concentrated his efforts on the taxicab and although he had a clear view of the cab and the immediate vicinity surrounding it, he did not see the defendant Wooten in possession of any bag containing a white substance (Tr 283).

After the transaction had been completed, Borchardt left the apartment and, accompanied by

Wooten, returned to his apartment on the west side (Tr 176).

At that point, Wooten was given back his original $2,000.00 plus an additional $200.00 which has been variously described as a commission (Tr 177), interest, compensation for having misappropriated his money, or profit (Tr 224). In any event, it is quite clear that the word "commission" did not mean that he was involved in the handling of any sale. (Tr 224).

Borchardt acknowledges that during the time in question, March of 1975, he was a heavy user of marijuana and cocaine.

He stated that he was seeing a psychiatrist and his perception of reality has never really changed but his memory might be effected slightly (Tr 189-190). Furthermore, he acknowledges that during the early months of 1975, he had a substantial business in the sale of illegal substances of various sorts (Tr 191), and that he averaged approximately

$2,000 - $3,000 per week in illegal income.

Furthermore, he acknowledges that there were several versions of the story and that he had repeatedly lied to the federal agents (Tr 232).

In fact, the federal agents testified that Borchardt had changed his story on the eve of trial (Tr 74-76). Despite all of this contradictory dialogue, the government has not been able to produce the records of the various statements given by Borchardt (Tr 2-7).

On May 5, 1975, the agents executed arrest and search warrants at Borchardt's apartment. (Tr 45).

Apparently drugs and narcotics paraphernalia were found by the agents within the Borchardt apartment (Tr 142). The agent who testified inferred that Wooten was arrested in an apartment which contained drugs (Tr 71). However, this testimony was at best misleading. For the federal officers had actually brought Wooten to the apartment, and although they had "previously placed him in custody," the technical

arrest took place in Borchardt's apartment (Tr 71, 137, 141).

After their arrest, a conversation took place in the Federal House of Detention between Borchardt and Wooten (Tr 181). On direct examination, Borchardt testified that he and Wooten went over the details concerning the incident and that Wooten requested Borchardt to advise the authorities that Wooten had not participated in any of the cocaine related transactions.

The U.S. Attorney raises the inference that Borchardt was asked to lie by Wooten. The U.S. Attorney points out this fact on his summation (Tr 320) and the Court advises the jury, in its charge, that it may consider this as evidence of the defendant's guilt (Tr 353-354).

In fact, the record is absolutely clear that Wooten's conversation with Borchardt was predicated upon the desire of Wooten to have Borchardt tell the truth (Tr 228-229).

The defense was prohibited from presenting its witnesses. (A-28).

ARGUMENT

POINT I

THE FAILURE TO GRANT AN ADJOURNMENT EFFECTIVELY DENIED WOOTEN HIS RIGHT TO COUNSEL.

Apparently, secure in his thought that his client would not go to trial, Wooten's attorney failed to advise him of the trial date until shortly before it was scheduled to begin. (A-12).

Having been told of these facts, the Court still denied Wooten's application for a short adjournment. The defendant:

> "My counsel and I have reached an irreconcilable point. It seems very crucial to me. I would like to make application to obtain another counsel..." (A-10).

This point was confirmed by the defendant's lawyer (A-14).

Nevertheless, the Court refused the defendant's application for an adjournment of a week or two, stating:

> "I am not putting this case over for a week or two by any manner or means. My calendar is set up with trials back-to-back. This

means a complete disorientation." (A-13).

Although the case was on the Trial Calendar only five weeks, apparently the Court concluded that any further delay would act as a denial of the defendant's "right to a speedy trial". Query, if the defendant is applying for the adjournment and the application has merit, how could it be deemed a denial of his right to a speedy trial. Furthermore, Wooten contends that the refusal of the Court to grant him this adjournment effectively denied him his right to counsel and due process of law.

The Supreme Court has held that a trial court's failure to provide reasonable time and opportunity to secure counsel and prepare for trial, is a clear denial of due process. Powell v. Alabama, 287 US 45 (1932); Avery v. Alabama, 308 US 444 (1940); Lee v. U.S., 235 F.2d 219 (D.C. Cir. 1956); Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970).

POINT II

AN INDICTMENT PREDICATED UPON PURJURED TESTIMONY MUST BE DISMISSED.

At trial, the arresting officer admits having lied to the Grand Jury about a material issue of fact. (Tr 89).

At that point, it was incumbent upon the prosecution to move for a mistrial. U.S. v. Basurto, 497 F.2d 781 (9th Cir. 1974); United States v. Harris, 368 F.Supp. 697, 715 (D.C. 1973).

A sale of narcotics was to take place in an apartment on 3rd Avenue. The undercover officer was sitting in his parked car waiting for the arrival of a man in a blue ski jacket. A cab with two persons in it came to a stop in a traffic lane a short distance past the entrance to the building. At this point, the agent exited from his vehicle and started to walk towards the building. His trial testimony indicated that a man in a blue ski jacket then exited from the cab and the agent "observed him hand a clear

plastic package with white powder to the man..." who was still in the cab and was, according to the agent, still paying the fare. (Tr 39).

Curiously, although the alleged transfer was observed from 10 to 15 feet from the cab, and the cab was parked past the entrance to the building, the agent entered the building after the man in the blue ski jacket and while the other passenger was still paying the fare. (Tr 40).

Before the Grand Jury, however, the agent told a different tale. There, the agent claimed that both passengers had left the cab when the transfer took place. (Tr 89).

POINT III

THE ACTIONS OF THE PROSECUTOR ARE SO PREJUDICIAL AS TO WARRANT REVERSAL.

The prosecution of this action is marred by prejudicial statements of the prosecutor, destruction or loss of evidence by the prosecutor.

At the outset, the prosecutor states:

> "...This is a drug case. The government will present evidence that will show that the defendant William Wooten raised substantial money for and participated in a large cocaine deal.
>
> "This is a simple case, a straightforward one. William Wooten is on trial for conspiring to violate the narcotics laws and distributing and possessing with intent to distribute approximately 7 ounces or, said another way, 195 grams of cocaine." (Tr 23).

This simply is not true. The government's own witness clearly states that Wooten never financed or participated in any cocaine transaction. This opening statement was so prejudicial as to preclude any possible deliberation of the jury which would be free from its taint. Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915 (4th Cir. 1965).

The prosecution could not produce records of statements made by one of their witnesses who admittedly had told several versions of the same story.

In fact, it is acknowledged by the arresting

officer that the witness had, just a few days prior to trial, once again changed his story. The Court refused to allow the defense to bring this issue before the jury. It is submitted that this ruling was highly prejudicial and erroneous in that the testimony of the two government witnesses, agent Greenan and Borchardt, was suspect. By prohibiting the defense from showing these facts to the jury, the defendant was denied a fair and impartial trial. The jury has a right to know that the government has either lost or destroyed evidence that its key witness had lied or misrepresented facts. 2 Wigmore Sec. 278.

In addition, the government attempted to link up Wooten with drugs found in Borchardt's apartment. (A- 8). In fact, federal agents had Wooten in custody and actually brought him to the apartment wherein another officer executed the technical arrest. The attempt by the prosecution to attribute those drugs found in the apartment with Wooten is both improper and prejudicial. This inference which is

un supported by the record and which comes as a direct result of the actions of the federal government, must not be condoned by this Court.

POINT IV

THE DEFENDANT WAS DENIED HIS RIGHT TO OFFER EVIDENCE IN HIS OWN BEHALF AT TRIAL.

The defense offers to prove that the government agents were prejudiced against Wooten and that the prosecution could not produce documents which contained contradictory statements of a key witness.

The defense offered to prove that Wooten, in an unrelated matter which took place prior to the indictment herein, had reported the federal officers for improper conduct. (A-29-30).

This evidence would attack the reliability and credibility of the prosecution and would have been determinative of the innocence or guilt of Wooten. The denial by the Trial Judge of Wooten's offer of proof, in light of the officers admitting lying to the Grand Jury, the loss or destruction of evidence by another government witness, and the inexcusable inference raised by

the prosecutor in his opening concerning cocaine financing, was a clear abusive discretion by the Trial Judge and effectively denied the defendant of his right to present evidence. United States v. Seijo, 514 F.2d 1357 (2nd Cir. 1975).

POINT V

THE COURT'S INSTRUCTIONS TO THE JURY WERE CONFUSING AND MISLEADING.

At the outset there were two technical errors which appear in the charges to the jury. First, having recited the reasons why defendant should be found not guilty, it appears from the record that the Court said, 'in such circumstances you should find the defendant guilty." (A-37).

The Court also states, "the proof indicates" that the defendant knew only Borchardt, one of the alleged co-conspirators. (A-45).

It is respectfully submitted that it was improper for the Court to use language such as "the proof indicates" in that it is for the jury to de-

termine the inferences which may be drawn from the facts.

In light of the evidence that the federal government brought Wooten into the apartment on May 3, 1974 wherein the co-defendant Borchardt was in possession of marijuana, it was highly prejudicial for the Court to charge the jury that it may find the defendant guilty of conspiracy with Borchardt with respect to that marijuana. (A-46-47).

Finally, and perhaps most important, the Court elects to give the jury two alternative theories under which it may find the defendant guilty. The first theory allows the jury to consider all of the evidence submitted, while the second theory is predicated upon the fact that the jury need not believe the evidence given by the co-conspirator Borchardt. (A-66).

A reading of the record does not support these considerations. In fact, if the evidence of the co-conspirator were not to be believed, there

would be no linking of the contraband with the defendant Wooten.

This absence of a vital link in the government's chain of evidence would mandate a verdict of acquittal.

It is respectfully submitted that the Court in allowing the jury to consider both alternatives, recruited Wooten from obtaining a fair and impartial deliberation and may very well have resulted in the conviction. Furthermore, as evidence of the confusion inherent in the judge's charge, one juror wrote to the court indicating that he was confused about what had happened and that he wished to reconsider the verdict. (A-76, 77).

The Trial Judge refused to grant any of the oral requests to charge which were made by the defense counsel. The failure of the Judge to allow the charges to be given, the hasty nature in which the trial was brought on, and the failure of the Court to grant the defendant the right to offer proof of the

prosecution's wrongdoing, presents a dismal picture of our judicial process. Bollenbach v. United States, 326 U.S. 607 (1945); Bihn v. United States, 328 U.S. 633 (1946); Polansky v. United States, 332 F.2d 233 (1st Cir. 1964); U.S. v. Clarke, 475 F.2d 240 (2nd Cir. 1973).

POINT VI

WOOTEN'S GUILT HAS NOT BEEN PROVED BEYOND A REASONABLE DOUBT.

It is respectfully submitted that the government's case is a conglomeration of mutually exclusive factual propositions. The government presented five key witnesses. If the jury disregarded the testimony of Borchardt, then the remaining witnesses did not establish a prima facie case against Wooten.

If the jury believed Borchardt, then his testimony fails to establish any overt act in support of the conspiracy. Indeed, the testimony indicates that Wooten was lied to and misled.

At best, the government's undercover agent is an admitted liar.

The government's undercover police officer states that he could not see into the cab, yet he is the sole agent to testify that the transfer of narcotics allegedly took place in the cab.

Not only could agent Greenan not remember the weather conditions (Tr94), but as noted previously he acknowledges lying before the Grand Jury (Tr 89). Furthermore, although the official reports concerning the arrest of Wooten bear his signature, the federal officer could not recall interviewing Wooten or Borchardt and is equivocable about the defendant's description. At trial, the officer acknowledges preparing the reports; however, he states that the observations reflected the comments of other agents.

The last three government witnesses, highly trained surveillance agents, testified that they never observed either of the two transfers of narcotics which allegedly took place in broad daylight between Borchardt and Wooten. (Tr 259, 275, 283).

The agents individually testified that they were stationed such that they observed the

cab, building and surrounding area from a clear view noting the only item Wooten ever possessed was a banana.

Two key government witnesses acknowledged lying and, yet the prior statements of one disappears or is destroyed while in the exclusive possession of the government.

Even the circumstances of the contrived arrest, when closely examined, do not implicate or associate the defendant with narcotics. Federal agents placed Wooten in custody and proceeded to take him into Borchardt's apartment.

Narcotics were found within the apartment. At that point, the "arrest" of Wooten took place. Consequently, when questioned about the "arrest", the arresting officer attempted to associate Wooten with the drugs in Borchardt's apartment.

As a matter of law, the prosecution has failed to prove the elements of the crime as charged in its indictment. Consequently, it is respectfully submitted that the defendant's motion for acquittal should have been granted.

CONCLUSION

For all of the reasons stated above, it is respectfully submitted that the judgment of the District Court should be reversed and the indictment dismissed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against- Docket #75-1399

WILLIAM WOOTEN,

Defendant-Appellant.
----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

HERMAN H. TARNOW, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at New York City.

On February 6, 1976 your deponent served two copies of the appellant's brief and the appendix upon the United States Attorney for the Southern District, at the Courthouse, Foley Square, New York, New York, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this

6th day of February, 1976.

HERMAN H. TARNOW

Marcia Goldberg

MARCIA GOLDBERG
Notary Public, State of New York
No. 41-1186850
Qualified in Queens County
[redacted]